Supreme Court, U.S.
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NO. 98-1198

IN THE

Supreme Court of the United States

OCTOBER TERM , 1998

DANIEL SCOTT COX, PETITIONER

V.

LABOR (INDUSTRIAL) COMMISSION ET. AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

ADMINISTRATIVE COURT / LABOR COMMISSION OF UTAH

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT WESLO/LIBERTY

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SUMMARY

Respondents seek only the preservation of the ruling denying judicial review. Where their Response fails to dispute this Courts jurisdiction under 28 USC 1257(a) pursuant to Grovey v. Townsend, 79 L.Ed 1292 where no state right of judicial review exists, Certiorari should be granted.

REPLY TO RESPONDENTS ARGUMENT THAT THIS COURT HAS NO JURISDICTION TO REVIEW THIS MATTER

1. Pg 7, Respondents argue that jurisdiction is limited to final orders to avoid piecemeal litigation without rebuttal to Petitioner's citation to Engl and Cox or any statement as to how piecemeal review can possibly occur where all federal issues are included (Pg 13 - 15 of Petition).

2. Pg 7, Respondents argue that Petitioner never received a final appealable order, and that he is under erroneous impression that he has some form of constitutional right to an order.

The Utah Constitution declares:

> "The executive power of the state shall be vested in the Governor who shall see that the laws are faithfully executed." Art. VII, Sec. 5
>
> "All courts shall be open, and every person, for an injury done to him ... shall have remedy by due course of law, which shall be administered without denial or

unnecessary delay ..." Art. I, Sec. 11

Where, the Labor Commission is part of the Executive, their failure to execute their duty and provide the "Order on Review" pursuant to UCA 63-46b-12(6)(a) is a constitutional breach which denied Petitioner of his remedy (Final Order) by due course of law. And the arbitrary denial of a right to Summary Judgement without finding of fact is a breach of the "Unnecessary Delay" clause of Art. I, Sec. 11 of the Utah Constitution.

The Ut. Sup. Ct. has accepted jurisdiction and reversed the denial of Summary Judgement on Interlocutory Appeal in Cook v. Keiwit, 376 P2d 616. And the Sup. Ct. of Wis. under constitutional language similar to Utah's constitution reversed the denial of a Summary Judgement stating:

> "summary judgement ... should not have been postponed until after trial on merits, since expenses to defendant of trial on issues and disruption of defendants business would ... deprive defendant of constitutional right to a prompt remedy." Werner v. Milwaukee, 31 NW 2d 605

Thus, Respondents argument is incorrect, Petitioner has been denied a constitutional right.

3. Pg 7, Respondents assert that Petitioner "has been repeatedly advised" of the requirement for a hearing before benefits are awarded.

THIS IS A FALSE REPRESENTATION WHICH THEY

ALSO STATED TO THE UTAH COURTS, AND WHICH THEY HAVE BEEN WARNED ABOUT.

Respondents rely upon the letter of 9/17/97 from Mr. Hennebold (See Pg 4 of Response). The two letters of 9/8/97 and 9/12/97 referenced by Mr. Hennebold concern a criminal complaint (Exh. I & J), not Petitioner's claim before the Commission.

Petitioner has never been informed that a hearing is required, Respondent Commission has filed no pleadings establishing that a Hearing is mandatory, and were that the case, Summary Judgement as a way to protect Constitutional rights would be abridged.

Respondents repeatedly cite this FALSE REPRESENTATION to demean Petitioner (See Pg 4, 7, 10) in an attempt to bias this Court, which misconduct is egregious.

4. Pg 7 & 8, Respondents argue variously that Petitioner's claim is "fictitious", without "substance or color of merit", "rests upon obviously false assumptions", and is "unsubstantial".

Respondents fail to point out any misrepresentation regarding: (a) the fact that all Motions were Uncontested or that they met the requirements for award (Pg 20 & 21 of Petition), or (b) that the Courts decision is in err or otherwise improper (Pgs 21 - 25 of Petition).

The right to Summary Judgement is a Constitutional right under the Utah Constitution where it is a "remedy" which avoids "Unnecessary delay".

Petitioner sought the administrative equivalent of an interlocutory order under UCA 63-46b-12 which was arbitrarily with-held thus treating Petitioner differently than others (Order's on Review recently issued by Commission pursuant to UCA 63-46b-12 include 8950248, 8950403, 8950426, 920817, 940720, 950059, 953014, 950920, 940681 plus 25 other cases). Thus, Petitioner is not treated equally under the law, and has a "real" federal question where his 14th amendment rights are violated. Thus the criteria of Caldwell v. Texas, 137 US 692, 697 - 698 are met.

Petitioner in detail presented to both the Utah Court of Appeals and the Utah Supreme Court, the administrative process where-by the Courts are mandated to accept jurisdiction for an appeal arising through the administrative procedures act before a Hearing is conducted. Where the Utah Courts simply ignored and failed to harmonize the statutes (Pgs 21 - 25 of Petition), they have committed error which deprives Petitioner of his due process rights. And where the Courts improperly rewrite the statutes by their decision, they "Make a Law" which abridges Petitioner's 14th Amendment rights. Petitioner cited constitutional violations to both courts. Thus, contrary to Respondents assertions, there is both "substance" and "color of merit" in the Federal questions presented in the Petition as required by Parker v. McLain, 237 US 469.

Petitioner's Petition draws into Federal question both UCA 35-1 (See Petition Pgs 15 - 18) and UCA 35-1-88 (See Petition Pgs 18 - 20) as being made unconstitutional by the Commission's Arbitrary actions. Petitioner has made a substantial showing which calls into question state stat-

utes, satisfying the criteria of Wick v. Chelan, 280 US 108.

Thus the citations by Respondents actually support Jurisdiction by this Court.

5. Respondents request that the Petition for Certiorari be denied must be rejected for three reasons.

First, as shown above, their argument is without merit and is totally inconsistent with the facts.

Second, their question and argument does not encompass the jurisdiction under 28 USC $1257(a) pursuant to Grovey v. Townsend, 79 L.Ed 1292. Even if their argument prevailed, it would simply reinforce the absence of Judicial Review of the Commission's Orders which is grounds for Certiorari (See Petition Pgs 10 - 12).

Third, even if their argument were persuasive, which Petitioner denies, only Question 3 of the Petition would be negated.

Thus, where Respondents argument fails to encompass this Court's jurisdiction for review where State judicial review is not available, and/or where their arguments are unsubstantial and without merit, Certiorari should be not denied, but should be granted.

MISREPRESENTATIONS IN RESPONSE

Petitioner, per Sup. Ct. Rule 15, cites Respondents misrepresentations.

6. Page 1, Para. 1 & n. 2, Respondents misrepresent Petitioner's father's participation to support their claims of voluminous, frivolous and incomprehensible pleadings. Petitioner has not "asserted" that his father was his "Attorney in Fact". Petitioner has at all times maintained control of his case.

7. Respondents statements at Pg 1, n. 1, and Pg 2, para 1, fails to inform the Court that the reason "Voluminous" pleadings occurred was because Respondents failed to admit or deny the averments of Petitioner's initial pleading. The record does not show that Petitioner's motions were premature and should be resubmitted. The ALJ denied the 22 Uncontested motions without finding of fact, protecting Respondents from Default.

8. Respondents at Pg 2 improperly introduce the opinion of Dr. Hardy and Dr. Lewis-Younger as being Petitioner's chosen physicians. These U of U Toxicologists were recommended on 15 November 1996 by Respondents. The primary purpose of the April 97 evaluation was to determine if Petitioner suffered a pre-existing anxiety condition as alleged by Respondents, an issue where they carried the "Burden of Proof" as to their denial of compensability on grounds of a pre-existing anxiety condition.

Petitioner provided a detailed medical history and denied any pre-existing anxiety condition in his pleadings which Respondents were required to controvert per Rule 8(b) & 11, Utah R.Civ.P., and per the precedent of Hackford v. Ind. Comm., 358 P2d 899

Respondents are not able to do so. If they were, they would have presented this proof to this Court in order to demonstrate that Petitioner's appeal is truly without merit.

Respondents know as Petitioner knows that Petitioner was and is entitled to Summary Judgement.

> "The moving party is entitled to judgement as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof." Barfield v. Brierton, 883 F2d 923

9. Pg 3, para 1, Petitioner denies any defamatory or libelous statements as asserted by Respondents to inflame this Court against Petitioner. Petitioner has factually documented Respondents misconduct (Exhibit H, Pg 65a of Petition) which misconduct their Response does not deny. And the record contains no such contemporaneous allegations.

10. Respondents statement on Pg 3, last Para. misrepresents the facts where they state that "Petitioner filed numerous documents which, taken together, may have collectively amounted to a Motion for Review" to create the impression of abusive filings.

On 7/31/97, Petitioner filed a single appeal (with later amendments) which stated:

> "Petitioner therefore files this Motion for Review in accordance with [UCA] 63-46b-12."

11. On page 4, para 1 & 2, Respondents misrepresent the 9/17/97 letter of Mr. Hennebold (Exhibits I & J). (See 3. here-in)

12. On Pg 4, n. 3, Respondents again misrepresent the facts. On 1/12/98, Respondents filed a "voluminous" 76 page data package, and where the Commission still continued adjudication, and where Respondents had failed to controvert Petitioner's averments and continued to conceal UOSH records and evidence, Petitioner was compelled to request substantial Admissions and Stipulations to narrow the issues for the pending hearing. Respondents countered with an improper Motion for Protective Order to avoid answering.

13. Pg 6, para 3, Respondents again misrepresent the facts. Petitioner did not "chose to file numerous appeals rather than submit to an evidentiary hearing".

Petitioner properly and timely filed ONE appeal to the Commission regarding the arbitrary denial of his Uncontested Motions for Summary Judgement and Sanctions. When it became apparent that his administrative remedies were inadequate, Petitioner simply followed the statutory appeal process through the judicial system.

REBUTTAL OF RESPONDENTS RULE 42 REQUEST FOR SANCTIONS

14. Respondents quest for sanctions is without merit. Petitioner has carried a huge burden in bringing this "Issue of First Impression" forward to this Court.

As shown here-in, the Petition is well founded on both fact and law, and the jurisdiction claimed under Grovey v.

Townsend, 79 L.Ed 1292, Cox v. Cohn, 43 L.Ed 2d 328, Gillespie v. United States, 13 L.Ed 2d 199, United States v. Richmond, 279 F2d 170, and Flynt v. Ohio, 68 L.Ed 2d 489 is NOT UTTERLY FRIVOLOUS.

Petitioner asks this Court to simply judge the merits of Respondents accusation of a "Paper War" in light of Petitioner"s well reasoned, factually accurate and fully justified Petition and Reply. Respondents allegations are WITHOUT MERIT.

Respondents rely upon Talamini v. Allstate, 85 L.Ed 2d 125 which states:

> "Unless there has been a gross abuse of the judicial process, or demonstrable and significant harm to a litigant, such action [sanctions] is not warranted." Pg 127

There has been no abuse of the judicial system, simply a progressive and well reasoned appeal process to perfect Petitioner's constitutional rights. Respondents have no significant harm. To sanction Pro Se litigants raising "First Impression Claims" would more harm to the vitality of the judicial process (Talanini, Pg 127-128) than to deny them the benefits of subsequent hard earned victory (as in Salt Lake City v. Ohms, 881 P2d 844, 854 - 855; See also Retail v. NLRB, 466 F2d 380, 390; Stovall v. Denno, 18 L.ED 2d 1199, 1206.

Respondents allegations of a meritless and frivolous appeals must be rejected, along with their request for $1000 plus costs.

PETITIONER'S REQUEST FOR RELIEF

Respondents Response unfairly portrays Petitioner in an unwholesome light because they have no true grounds for opposing jurisdiction. They accuse without providing illuminating substance and they misrepresent the facts to obtain denial of Certiorari with unsubstantiated claims. If they had a case, all they needed to do was show this Court their evidence of a pre-existing anxiety disorder. BUT THEY CAN'T BECAUSE THEY HAVE NONE, THEY JUST MADE IT UP TO DENY PETITIONER HIS COMPENSATION.

Petitioner asserts that the content of the Response is "Unbecoming" of a member of the bar. It attacks without substance a Pro Se litigant who has dared to challenge the system for denying him his Constitutional rights to due process. Petitioner requests that Respondents Response be stricken or otherwise rejected as "Unmeritorious", "Inflammatory", "Unbecoming", and/or "Unsubstantial".

CONCLUSION

Contrary to this Court's intent, Respondents seek to divert the attention from the substance of circumstances and facts which properly support relief.

> "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman v. Davis, 9 L.Ed 2d 222, 226

Certiorari should be granted pursuant to Grovey v. Townsend where no right of State Judicial Review exists.

Respectfully submitted this 6 day of March 1999

Daniel S Cox

Daniel Scott Cox
Pro Se

APPENDIX

Note: page numbers 1a thru 73a are found in the Petition for Writ of Certiorari.

LIST OF AUTHORITIES

PRECEDENTS

Barfield v. Brierton, 883 F2d 923 (11th Cir. 1989)

> "The moving party is entitled to judgement as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof." 883 F2d 923 [Citing Everett, 833 F2d 1510]

Caldwell v. Texas, 137 US 692 (1891)

> "Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional process is satisfied. 2 Kent Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right or distributive justice. Bank of Columbia v. Okely, 4 Wheat. 235, 244. The power of State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. Hurtado v. California, 110 US 516, 535." Pg 697 - 698

Cook v. Keiwit, 386 P2d 616 (Ut. Sup. Ct 1963)

> "From an order of the fourth District Court, Utah County, Joseph E. Nelson, J., denying defendant's motion for summary judgement, the defendant appealed... Summary Judgement Ordered." 386 P2d 616

> "The lower court denied Kiewit's Motion for Summary Judgement and this court granted an Interlocutory Appeal." Case 9826, Brief of Appellant, Pg 7

Cox v. Cohn, 43 L.Ed 2d 328 (US Sup. Ct. 1975)

> See Pg 30a of Petition

Engl v. Aetna, 139 F2d 469 (2nd Cir. 1943)

> See Pg 34a of Petition

Flynt v. Ohio, 68 L.Ed 2d 489

> See Pg 34a of Petition

Foman v. Davis, 9 L.Ed 2d 222 (US Sup. Ct. 1962)

> "It is contrary to the spirit of the Federal Rules of Civil Procedure for a court to avoid a decision on the merits on the basis of mere technicalities," 9 L.Ed 2d 223

> "If the underlying facts or circumstances relied upon

by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." 9. L.Ed 2d 226

Gillespie v. United States, 13 L.Ed 2d 328

See Pg 35a of Petition

Grovey v. Townsend, 79 L.Ed 1292 (US Sup. Ct. 1935)

See Pg 36a of Petition

Hackford v. Ind. Comm., 358 P2d 899 (Ut. Sup. Ct. 1961)

"... employer has burden to sustain ... where claimant had filed written objections..." Pg 899

Parker v. McLain, 237 US 469 (1915)

"Our jurisdiction to review the judgement of the highest court of a State turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision." Pg 471

Retail v. NLRB, 466 F2d 380 (DC Cir. 1972)

"The Supreme Court has identified a number of reasons calling for the application of a new rule to the parties to the adjudicatory proceeding in which is first announced ... Thus the Court has suggested that to deny the benefits of a change in the law to the very parties whose efforts were largely respon-

sible for bringing it about might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines. The Court has also made reference to "sound policies of decision making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies ..." 466 F2d 390 [with footnote citation to Stovall v. Denno, 388 U.S. 293, 301, 87 S.Ct. 1967, 1972, 18 L.Ed 2d 1199 (1967)

Salt Lake City v. Ohms, 881 P2d 844 (Ut. Sup. Ct. 1994)

"However, it would be unconscionable to deprive Ohms, who has sustained the burden of attacking an unconstitutional statute of the fruits of victory, thereby discouraging challenges to statutes of questionable validity... In cases like the one at bar, "considerations of judicial integrity require us to extend the benefit of our decision to the petitioner." Pg 854 - 855

Stovall v. Denno, 18 L.Ed 2d 1199 (US Sup. Ct. 1967)

"We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the com-

mand of Article III of the Constitution that we resolve issues solely in concrete cases and controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefits of today's decisions. Inequity arguably results from according the benefit of a new rule to parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." 18 L.Ed 2d 1206

Talamini v. Allstate, 85 L.Ed 2d 125

"Unless there has been a gross abuse of the judicial process, or demonstratable and significant harm to a litigant, such action [sanctions] is not warranted." Pg 127

"Of greater importance than the practical problems associated with the processing of motions of this kind is the symbolic significance of the action that the Chief Justice proposes. Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest

presumption of open access to all levels of the judicial system. Creating the risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principles of open access." Pg 127 - 128

United States v. Richmond, 279 F2d 170

See Pg 53a of Petition

Werner v. Milwaukee, 31 NW 2d 605 (Wis.Sup. Ct. 1948)

"summary judgement ... should not have been postponed until after trial on merits, since expenses to defendant of trial on issues and attendant disruption of defendant's business would ... deprive defendant of constitutional right to prompt relief." 31 NW 2d 605

Sec. 9, Art. I of the Wisconsin Constitution declares "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." 31 NW 2d 606

Wick v. Chelan, 280 US 108 (1929)

> "No attempt was made to draw into question the validity of any other provisions of the state statutes." Pg 111

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

Constitutional Provisions

Article VII, Section 5

> "The executive power of the state shall be vested in the Governor who shall see that the laws are faithfully executed." Art. VII, Sec. 5

Article I, Section 11

> "All courts shall be open, and every person, for an injury done to him ... shall have remedy by due course of law, which shall be administered without denial or unnecessary delay ..." Art. I, Sec. 11

Amendment XIV, Section 1, U.S. Constitution

> See Pg 12a of Petition

Worker's Compensation Statutes

UCA 35-1

See Pg 13a of Petition

UCA 35-1-88

See Pg 14a of Petition

Administrative Procedures Act Statutes

UCA 63-46b-12

See 15a of Petition

Utah Rules of Civil Procedure Page No.

Rule 8(b) Utah R.Civ.P.

> "Unless the pleader intends in good faith to controvert all the averments of the preceding pleading ... he may generally deny all the averments ... but when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11."

Rule 11, Utah R.Civ.P.

> "The signature of an attorney ... constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it

is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... If a pleading, motion or other paper is signed in violation of this rule, the court upon motion or its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction..."

Supreme Court Rules of Appellate Procedure

Rule 15 US Sp. Ct. Rules

"Counsel are admonished that they have an obligation to the Court to point out ... any perceived misstatement made ..."

Federal Statutes

28 U.S.C.A. $1257(a)

See Pg 22a of Petition

EXHIBIT I

Alan Hennebold 8 September 1997
General Counsel
Utah Labor Commission

Subject: Complaint to UOSH, Mr. Ellertson, and the Attorney General dated 8 Aug 1997

Re: Your letter dated 2 September 1997

Dear Mr. Hennebold,

The content of the letter is omitted because it would be a violation of statute to reveal the contents where an investigation may be pending.

"s/Daniel S. Cox"

EXHIBIT J

12 September 1997

Commissioner Ellertson
C/O Alan Hennebold
General Counsel
PO Box 146600
Utah Labor Commission
Salt Lake City, Utah
84114-6600

Re: A) Letters to Mr. Hennebold and Mr. Bagley of 2 and 8 September 1997
B) My letter to Mr. Hennebold dated 8 September 1997

Subject: Actions regarding my Complaint of 8 August 1997

Dear Sir,

The content of the letter is omitted because it would be a violation of statute to reveal the contents where an investigation may be pending.

"s/Daniel S. Cox"